Supreme Court, U.S.
FILED

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No. 99-

IN THE
Supreme Court of the United States

PEGGY FRYE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether charging a jury regarding "deliberate ignorance" violates a criminal defendant's due process rights when the evidence adduced at trial does not factually support the instruction, and consequently, whether erroneously giving a "deliberate ignorance" instruction can constitute harmless error?

TABLE OF CONTENTS

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Cited Authorities	iii
Table of Appendices	ix
Opinion Below	1
Statement of Jurisdiction	1
Constitutional and Statutory Provisions Involved	2
Statement of the Case	3
Reason for Granting the Writ	9
I. The Petition Should Be Granted To Resolve A Split Among The Circuits Concerning An Important Constitutional Question.	9
A. The Circuits are Split Regarding the Standard for Measuring Whether a "Deliberate Ignorance" Jury Instruction is Justified.	9
B. The Circuits are Split Regarding the Manner in Which the Harmless Error Doctrine is Applied to an Improper Instruction on "Deliberate Ignorance."	18
Conclusion	21

TABLE OF CITED AUTHORITIES

Page

Cases:

Chapman v. California, 386 U.S. 18 (1967) 19, 20

Gilbert v. Moore, 121 F.3d 144 (4th Cir. 1997) ... 20

Marshall v. Lonberger, 459 U.S. 422, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983) 18

Rose v. Clark, 478 U.S. 570, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) 19

Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L. Ed. 2d 39 (1979) 17, 19

United States v. Adeniji, 31 F.3d 58 (2d Cir. 1994) 9, 11, 18

United States v. Aguilar, 80 F.3d 329 (9th Cir. 1996) 18

United States v. Barnhart, 979 F.2d 647 (8th Cir. 1992) 10, 14

United States v. Baumgardner, 85 F.3d 1305 (8th Cir. 1996) 20

United States v. Beckett, 724 F.2d 855 (9th Cir. 1984) 19

Cited Authorities

Page

United States v. Boothe, 994 F.2d 63 (2d Cir. 1993) 12

United States v. Brandon, 17 F.3d 409 (1st Cir.), *cert. denied*, 513 U.S. 820, 115 S. Ct. 80, 130 L. Ed. 2d 34 (1994) 11

United States v. Caliendo, 910 F.2d 429 (7th Cir. 1990) 18, 19

United States v. Cicero, 22 F.3d 1156 (D.C. Cir. 1994) 20

United States v. Covington, 133 F.3d 639 (8th Cir. 1998) 18

United States v. Craig, 178 F.3d 891 (7th Cir. 1999) 10, 14

United States v. de Francisco-Lopez, 939 F.2d 1405 (10th Cir. 1991) 10, 11, 15, 16, 19

United States v. Diaz, 864 F.2d 544 (7th Cir. 1988) 14

United States v. Drummond, 903 F.2d 1171 (8th Cir. 1990) 19

United States v. Ebert, 178 F.3d 1287 (4th Cir. 1999) 18

Cited Authorities

	Page
United States v. Gabriele, 63 F.3d 61 (1st Cir. 1995)	9, 11
United States v. Gruenberg, 989 F.2d 971 (8th Cir. 1993)	14
United States v. Hasting, 461 U.S. 499, 103 S. Ct. 1974, 76 L. Ed. 2d 96 (1983)	19
United States v. Hiland, 909 F.2d 1114 (8th Cir. 1990)	14
United States v. Hilliard, 31 F.3d 1509 (10th Cir. 1994)	18
United States v. Johnson, 968 F.2d 768 (8th Cir. 1992)	19
United States v. Kelm, 827 F.2d 1319 (9th Cir. 1987)	15
United States v. Lee, 991 F.2d 343 (6th Cir. 1993)	13
United States v. Long, 977 F.2d 1264 (8th Cir. 1992)	14
United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir. 1991)	19

Cited Authorities

Page

United States v. Mapelli, 971 F.2d 284 (9th Cir. 1992) 10, 11, 15

United States v. Mari, 47 F.3d 782 (6th Cir. 1995) 10, 13, 18

United States v. Melendez, 90 F.3d 18 (2d Cir. 1996) 20

United States v. Murrieta-Bejarano, 552 F.2d 1333 (9th Cir. 1977) 17

United States v. Ojebode, 957 F.2d 1218 (5th Cir. 1992) 13, 18

United States v. Perez-Tosta, 36 F.3d 1552 (11th Cir. 1994) 20

United States v. Prather, 205 F.3d 1265 (11th Cir. 2000) 16

United States v. Rawlings, 73 F.3d 1145 (D.C. Cir. 1996) 21

United States v. Regan, 940 F.2d 1134 (8th Cir. 1991) 19

United States v. Richardson, 14 F.3d 666 (1st Cir. 1994) 11

Cited Authorities

Page

United States v. Rivera, 944 F.2d 1563 (11th Cir. 1991) 10, 11, 16

United States v. Rodriguez, 929 F.2d 1224 (7th Cir. 1991) 14

United States v. Ruhe, 191 F.3d 376 (4th Cir. 1999) 9, 12

United States v. Ruiz, 59 F.3d 1151 (11th Cir.), *cert. denied*, 116 S. Ct. 956 (1996) 20, 21

United States v. Sanchez-Robles, 927 F.2d 1070 (9th Cir. 1991) 15

United States v. Soto-Silva, 129 F.3d 340 (5th Cir. 1997) 10, 13

United States v. Spring, 80 F.3d 1450 (10th Cir.), *cert. denied*, 117 S. Ct. 385 (1996) 20

United States v. Stewart, 185 F.3d 112 (3d Cir. 1999) 9, 10, 12

United States v. Stone, 987 F.2d 469 (7th Cir. 1993) 14, 18

United States v. Stone, 9 F.3d 943 (11th Cir. 1993) 18, 19

Cited Authorities

Page

United States v. Thomas, 86 F.3d 647 (7th Cir.), *cert. denied*, 117 S. Ct. 392 (1996) 20

United States v. White, 794 F.2d 367 (8th Cir. 1986) 14, 19

Yates v. Evatt, 500 U.S. 391 (1991) 20

Statutes:

18 U.S.C. § 2 4

18 U.S.C. § 1952 3

21 U.S.C. § 841(a)(1) 2, 3

21 U.S.C. § 853 4

21 U.S.C. § 843(b) 4

21 U.S.C. § 846 ..... 2, 3

28 U.S.C. § 1254(1) 1

United States Constitution:

Fifth Amendment 2

TABLE OF APPENDICES

Page

Appendix A — Per Curiam Opinion Of The United States Court Of Appeals For The Sixth Circuit Dated And Filed January 5, 2000 ..... 1a

Appendix B — Order Of The United States District Court For The Middle District Of Tennessee, Cookeville Division Re Jury Instructions 12a

Appendix C — Order Of The United States Court Of Appeals For The Sixth Circuit Denying Petition For Rehearing Dated And Filed February 18, 2000 ..... 14a

Petitioner Peggy Frye respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINION BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit is unreported. (App. A). The opinion of the district court in *United States v. Frye*, No. 2-96-00013 (M.D. Tenn. 1997) is not reported. (App. B).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") was entered on January 5, 2000. The Court of Appeals denied a timely petition for rehearing and for rehearing *en banc* February 18, 2000. (App. C). This petition for writ of certiorari was filed within 90 days of the denial of rehearing.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part: "no person shall be . . . deprived of life, liberty, or property, without due process of law. . . ."

21 U.S.C. § 841(a)(1) provides, in pertinent part:

> Prohibited Acts A
>
> (a) Unlawful acts
>
> Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —
>
> > (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
> >
> > (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

21 U.S.C. § 846 provides, in pertinent part:

> Attempt and conspiracy
>
> Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy.

STATEMENT OF THE CASE

From early 1994 until late 1996, the Federal Bureau of Investigation (FBI) worked in conjunction with the Drug Enforcement Administration (DEA), the Bureau of Alcohol, Tobacco and Firearms (ATF), the Tennessee Bureau of Investigation (TBI), the 22nd Judicial Drug Task Force, the 18th Judicial Drug Task Force, the 15th Judicial Drug Task Force and the Criminal Investigation Division of the Tennessee Highway Patrol (THP) to investigate the distribution of methamphetamine in the Cookeville, Tennessee area. The investigating agents utilized a wide variety of investigative tools including, but not limited to, pen registers, wiretaps, body wires, aerial surveillance, informants, premises and package search warrants, and drug sniffing canines. These procedures yielded a substantial number of cooperating witnesses who later testified at the joint trials of defendants Peggy Frye, Timothy Holloway, Steve Nicely, Jack Parks, Robert Carney, Morris Parks and Ronnie Dixon in exchange for a governmental promise of leniency.

Petitioner Peggy Frye (hereinafter "Petitioner Frye") was named in an Indictment filed in the Middle District of Tennessee on November 21, 1996. Petitioner Frye was subsequently named in the First Superseding Indictment filed on May 2, 1997. On July 24, 1997, a Second Superseding Indictment was filed charging Petitioner Frye with conspiracy to distribute methamphetamine (Count One, 21 U.S.C. §§ 841(a)(1) and 846), with travel in interstate commerce with intent to distribute proceeds of unlawful activity (Count Eleven, 18 U.S.C. § 1952), with attempt to possess with intent to distribute methamphetamine (Count Fourteen, 21 U.S.C. §§ 841(a)(1) and 846), with criminal

forfeiture (Count Sixteen, 21 U.S.C. § 853), and with use of communication facility to cause a felony (Counts Seventeen and Twenty, 21 U.S.C. § 843(b) and 18 U.S.C. § 2).

Beginning on September 30, 1997, Petitioner Frye and her six codefendants were tied for their involvement in a large methamphetamine conspiracy occurring in both Tennessee and Kentucky. During the course of the five (5) weak trial, the government offered the testimony of approximately nineteen (19) cooperating witnesses who allegedly consumed methamphetamine distributed by the conspiracy on trial. On October 28, 1997, the government submitted a special request that the district court instruct the jury on deliberate ignorance. The request specifically targeted Petitioner Frye. On October 29, 1997, the district court granted the government's request for that instruction. Counsel for Petitioner Frye objected to the proposed deliberate ignorance instruction and filed a motion and memorandum in opposition. In that motion and supporting memorandum, Petitioner Frye articulated the highly prejudicial effect of such an instruction. In denying Petitioner Frye's motion, the district court determined that such an instruction could be given as long as Defendant Frye was not specifically referenced in the instruction. Although the district court removed any reference to Petitioner Frye by name, the court neglected to strike the feminine pronouns ("she" and "her"). After the instruction was read, counsel for Petitioner Frye objected out of the jury's presence to the use of feminine pronouns. Given the fact that Petitioner Frye was the only female defendant, the jury had no choice but to conclude that the instruction pertained exclusively to her. Judge Wiseman apologized for the mistake but held that the error was harmless.

Counsel for Petitioner Frye objected to the instruction since the government had just spent five (5) weeks attempting to prove Petitioner Frye's direct knowledge of the scheme. The proof revealed that Earl and Peggy Frye were married in 1972. After their marriage, Earl Frye's parents gave them an acre of land located at 760 Wixtown Road, Westmoreland, Tennessee. The property consisted of a house, a barn and a garage. The garage was where Earl conducted his automotive business repairing and cleaning cars. The garage was a separate, commercial type of building containing tools and compressors for working on cars. The proof also revealed that Earl Frye engaged in activities relating to the methamphetamine conspiracy on trial in that garage.

The proof was undisputed that Peggy Frye did not "hang out" or spend time congregating with Earl Frye's friends and associates in the garage. To the contrary, when she visited the garage, her purpose was to promptly tend to the needs of her husband (i.e., bring him food or medicine for his heart condition). In caring for her husband, she assumed a very subservient role to him. She "babied" him. As part of this pampering, she would place phone calls at her husband's request. Much of the time she would dial the telephone number and then hand him the phone, but sometimes she would relay messages to the recipient of the call while Earl dictated the message. Earl would sometimes insist that Peggy Frye answer the phone in order to screen his calls. The proof was undisputed that Petitioner Frye generally did not question her husband's authority or pry into the nature of his business. She knew that such an inquiry would be fruitless. The testimony further demonstrated that Earl Frye would only tell what he wanted her to know. The only time that Petitioner Frye directly confronted her husband was regarding a suspicion about his infidelity. In fact, Petitioner

Frye only confronted him because her daughter had independently confirmed that Earl was having an affair. After a brief separation, Petitioner Frye and her husband reconciled. From that point until the beginning of the trial, Petitioner Frye was operating under the mistaken belief that her husband was being faithful to her.

Several witnesses testified that they knew of Earl Frye's ongoing affair with his mistress, Judy Chapman. Many of those same individuals also testified that Earl took great pains to prevent Petitioner Frye from discovering the affair. Similarly, Earl Frye made a concerted effort to conceal his drug activity from Petitioner Frye. This was evidenced by the staggering number of witnesses who engaged in drug transactions with Earl and never had contact with Petitioner Frye or knew her to be involved in drugs. Government witnesses testified that Petitioner Frye spent the majority of her time on the property inside the house. Significantly, when investigators executed the search warrant for the property, no drugs were located in the home.

Petitioner Frye believed that her husband engaged in the automotive repair business and that he also had participated in some questionable dealings involving cars. She also knew that her husband had been investigated by law enforcement authorities for suspicion of using and trading stolen car and motorcycle parts. The lead investigating agent testified that he investigated Earl for dealing in stolen parts and further testified that the time of that investigation largely overlapped with the duration of the conspiracy on trial. In fact, Petitioner Frye's daughter's car had been impounded for five (5) months based on the suspicion that it contained stolen parts. Earl Frye manipulated Petitioner Frye's suspicion by telling her that he was getting car parts from a man named "Paul" in

California. He requested that when Petitioner Frye spoke with "Paul" on the telephone that she avoid using the word "parts" because Earl was not sure where these parts were coming from. At her husband's direction, Petitioner Frye would also relay information over the telephone to Codefendant Holloway, again not using the word "parts." Petitioner Frye thought that her husband was dealing in car parts with Co-defendant Holloway. As for the men who congregated in the garage, she believed they were socializing and working on cars. When investigating agents executed the search warrant for her property, Petitioner Frye denied any knowledge of drug activity on the property but stated that she thought Earl was dismantling cars.

The crux of the government's case against Petitioner Frye largely stemmed from her unavoidable association with her late husband, Earl Frye. Earl Frye died before trial in March of 1997. One of the government's primary cooperating witnesses admitted that, after Earl Frye died, he contacted the FBI and changed his story to include Petitioner Frye in order to maintain his deal of leniency with the government. Petitioner Frye was such a tangential and unknowing participant in this methamphetamine conspiracy that her name was not mentioned anywhere in the application for the wiretap. In fact, not only was Petitioner Frye not listed as an intended target of the wiretap, but the supporting Affidavit contained no facts linking her to the methamphetamine conspiracy or any other criminal activity.

The government focused its rebuttal closing on the deliberate ignorance instruction as it applied to Petitioner Frye. The government referred to Petitioner Frye's defense as the "blind love defense." The government vehemently attacked Petitioner Frye's assertion that she suspected her

husband of engaging in illegal activity but that the illegal activity which she suspected pertained to stolen parts:

> First of all, she's not blind, and she's not stupid. You can't stick your head in the sand like an ostrich and pretend not to see what is going on around you and have that be a defense. Look at the Judge's instructions.
>
> It's called deliberate ignorance. It's on page 21 and 22 of the Judge's jury charge. No one can avoid responsibility for a crime by deliberately ignoring the obvious.
>
> And even if you believe that she didn't do these acts knowingly, the deliberate blindness instruction is what she cannot get past because you cannot hide your face and pretend not to see.

At the oral argument before the Court of Appeals for the Sixth Circuit, the government claimed that the instruction was harmless error because the government had proven Petitioner Frye's direct knowledge of the methamphetamine conspiracy.

After a brief deliberation on October 31, 1997, the jury found Petitioner Frye guilty on Counts One, Eleven, Seventeen and Twenty and not guilty on Count Fourteen of the Second Superseding Indictment. On November 7, 1997, Petitioner Frye filed a motion for new trial. The Motion was denied on January 20, 1998. On January 20, 1998, the district court sentenced Petitioner Frye to a term of 151 months imprisonment in a federal correctional facility with five years of supervised release. On January 28, 1998, Petitioner Frye

filed a timely notice of appeal to the Court of Appeals, challenging the judgment and sentence imposed by the district court. The Court of Appeals affirmed the district court's use of the deliberate ignorance instruction holding that the instruction did not misstate the law in the Sixth Circuit and, even if there was no factual predicate for the instruction, the error was harmless.

REASON FOR GRANTING THE WRIT

I.

THE PETITION SHOULD BE GRANTED TO RESOLVE A SPLIT AMONG THE CIRCUITS CONCERNING AN IMPORTANT CONSTITUTIONAL QUESTION.

A. The Circuits are Split Regarding the Standard for Measuring Whether a "Deliberate Ignorance" Jury Instruction is Justified.

There is a vast split among the circuits as to the propriety and constitutionality of the "deliberate ignorance" jury instruction.[1] Some circuits find that the "deliberate ignorance" instruction is generally proper in any context. *See, United States v. Gabriele*, 63 F.3d 61 (1st Cir. 1995); *United States v. Ruhe*, 191 F.3d 376 (4th Cir. 1999). Other circuits caution the use of the instruction, finding it appropriate only when there is a strong factual showing that the defendant intentionally endeavored to avoid knowledge of particular nefarious fact. *See United States v. Adeniji*, 31 F.3d 58 (2d Cir. 1994); *United States v. Stewart*, 185 F.3d

1. The "deliberate ignorance" instruction is also commonly referred to as the "conscious avoidance," "willful blindness" or "ostrich" instruction.

112, 126 (3d Cir. 1999); *United States v. Soto-Silva*, 129 F.3d 340 (5th Cir. 1997); *United States v. Mari*, 47 F.3d 782 (6th Cir. 1995); *United States v. Barnhart*, 979 F.2d 647 (8th Cir. 1992). While, some circuits go further by holding that where there is proof of actual knowledge of an illegal undertaking, there can be no "deliberate ignorance" and hence, no instruction. *See United States v. Craig*, 178 F.3d 891 (7th Cir. 1999); *United States v. Mapelli*, 971 F.2d 284 (9th Cir. 1992); *United States v. Francisco-Lopez*, 939 F.2d 1405 (10th Cir. 1991); *United States v. Rivera*, 944 F.2d 1563 (11th Cir. 1991).

Even among the circuits which caution the use of the "deliberate ignorance" instruction, the reason for the apprehension varies. While some circuits merely warn that it will be a rare instance when the instruction is factually warranted; other circuits expound upon that sentiment by declaring that in an inappropriate case, the instruction can lessen or even shift the burden of proof and deny a criminal defendant due process. *Compare Stewart*, 185 F.3d at 126 (upholding a willful blindness instruction where the charge made clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability; further finding that a willful blindness charge does not lower the government's burden of proving intent as long as it emphasizes the necessity of proving a subjective awareness.); *Soto-Silva*, 129 F.3d at 344 (warning "of the risk inherent in such an instruction and that it is accordingly one which should rarely be given"); *Craig*, 178 F.3d at 896 ("The instruction is appropriate only when it addresses an issue reasonably raised by the evidence."); *with Barnhart*, 979 F.2d at 652 ("the instruction should not be given out in all cases because, despite the instruction's cautionary

disclaimer, there is a possibility that the jury will be led to employ a negligence standard and convict a defendant on the impermissible ground that he should have known an illegal act was taking place."); *Mapelli*, 971 F.2d at 286 ("the instruction is inappropriate where the facts point to actual knowledge rather than deliberate ignorance and should otherwise be used sparingly."); *Francisco-Lopez*, 939 F.2d at 1410-11 ("the danger in giving the instruction where there is evidence of direct knowledge but no evidence of avoidance of knowledge is that the jury could still convict a defendant who merely should have known about the criminal venture; conviction because the defendant 'should have known' is tantamount to conviction for negligence."); *Rivera*, 944 F.2d at 1570 ("the danger of overly liberal use of such an instruction in an inappropriate case is that juries will convict on a basis akin to a standard of negligence: that the defendant should have known that the conduct was illegal.").

The First Circuit holds that a "deliberate ignorance" instruction is warranted if: "(1) the defendant claims lack of knowledge; (2) the evidence would support an inference that the defendant consciously engaged in a course of deliberate ignorance; and (3) the proposed instruction, as a whole, could not lead the jury to conclude that an inference of knowledge was mandatory." *Gabriele*, 63 F.3d at 66 (*citing United States v. Brandon*, 17 F.3d 409, 452 (1st Cir.), *cert. denied*, 513 U.S. 820, 115 S. Ct. 80, 81, 130 L. Ed. 2d 34 (1994); *United States v. Richardson*, 14 F.3d 666, 671 (1st Cir. 1994)).

The Second Circuit requires a strong factual basis for the charge. *Adeniji*, 31 F.3d at 62-3. The Second Circuit declares that the "charge is proper 'where a defendant has claimed lack of some specific aspect of knowledge necessary to conviction but where the evidence may be construed as

deliberate ignorance.' " *Id.* (*quoting United States v. Boothe*, 994 F.2d 63, 69 (2d Cir. 1993)). The circuit further proclaims that "the evidence must allow a rational juror to conclude beyond a reasonable doubt that the defendant was aware of a high probability of the fact in dispute and consciously avoided confirming that fact." *Id.* The Second Circuit has often upheld "the use of conscious avoidance charges where a defendant concededly possessed an item, but denied knowledge of the illegal content or use of the item or was present at an illegal transaction, but denied knowledge of the illegal nature of the meeting." *Id.*

Meanwhile, the Third Circuit has upheld the use of a willful blindness instruction where the "charge made clear that the defendant himself was subjectively aware of the high probability of the fact in question, and not merely that a reasonable man would have been aware of the probability." *Stewart*, 185 F.3d at 126. The Third Circuit holds that "a willful blindness charge does not lower the government's burden of proving intent as long as it 'emphasize[s] the necessity of proving a subjective awareness.' " *Id.* Accordingly, "[i]f the charge satisfies this standard, and is supported by sufficient evidence, it is not inconsistent for a court to charge a jury on both an actual knowledge theory and a willful blindness theory." *Id.* (*citing United States v. Stuart*, 22 F.3d 76, 81 (3d Cir. 1994).

The Fourth Circuit dispenses with the factual predicate and condones the use of "deliberate ignorance" instructions as a fall-back position of the government. *Ruhe*, 191 F.3d at 384. This circuit offers little guidance to on the applicability of the charge and rarely reverses for an improper charge. *Id.*

The Fifth Circuit permits a "deliberate ignorance" instruction when the evidence raises two inferences. *Soto-Silva*, 129 F.3d at 344. First, "the evidence must show (i.e. raise a reasonable inference) that the 'defendant was subjectively aware of a high probability of the existence of the illegal conduct' and second, the evidence must show that the 'defendant purposely contrived to avoid learning of the illegal conduct.' " *Id.* (*quoting United States v. Ojebode*, 957 F.2d 1218, 1229 (5th Cir. 1992)). This circuit is careful to point out the "risk inherent in such an instruction and that it is accordingly one which 'should rarely be given.' " *Id.*

The Sixth Circuit expressly sanctions the "deliberate ignorance" instruction via its Pattern Jury Instruction. *United States v. Lee*, 991 F.2d 343 (6th Cir. 1993); Sixth Circuit Jury Instruction 2.09. This circuit claims that the instruction only applies when there is sufficient factual predicate to support a finding of deliberate ignorance beyond a reasonable doubt. *Mari*, 47 F.3d at 785-86. However, the foundational requirements are eroded by this circuit's harmless error analysis. *Id.* The Sixth Circuit engages in a circuitous harmless error analysis: if the charge was not factually warranted and the defendant was nonetheless convicted, then the jury must have convicted the person based upon a finding of actual knowledge; hence, the error in giving the instruction was harmless. *Id.* Hence, in the Sixth Circuit, there can never be reversible error based upon an erroneous "deliberate ignorance" instruction.

The Seventh Circuit declares that "[t]he purpose of the [conscious avoidance] instruction 'is to inform the jury that a person may not escape criminal liability by pleading ignorance if he knows or strongly suspects he is involved in criminal dealings but deliberately avoids learning more exact

information about the nature or extent of those dealings.' " *Craig*, 178 F.3d 891 (*quoting United States v. Rodriguez*, 929 F.2d 1224, 1227 (7th Cir. 1991)). The Seventh Circuit clarifies that "[t]he instruction is appropriate 'only when it addresses an issue reasonably raised by the evidence.' " *Id.* (*quoting United States v. Diaz*, 864 F.2d 544, 549 (7th Cir. 1988)). The circuit further states that "[e]vidence of deliberate ignorance of knowledge may be established by overt, physical acts as well as by 'purely psychological avoidance, a cutting off of one's normal curiosity by an effort of will . . . .' "*Id.* (*quoting United States v. Stone*, 987 F.2d 469, 472 (7th Cir. 1993)).

The Eighth Circuit instructs the jury on willful blindness "when the defendant asserts 'a lack of guilty knowledge, but the evidence support[s] an inference of deliberate ignorance.' " *United States v. Gruenberg*, 989 F.2d 971, 974 (8th Cir. 1993) (*quoting United States v. Long*, 977 F.2d 1264, 1271 (8th Cir. 1992)). However, the Eighth Circuit cautions that "the instruction should not be given out in all cases because, despite the instruction's cautionary disclaimer, there is a 'possibility that the jury will be led to employ a negligence standard and convict a defendant on the impermissible ground that he should have known [an illegal act] was taking place.' " *Barnhart*, 979 F.2d at 652 (*quoting United States v. White*, 794 F.2d 367, 371 (8th Cir. 1986)). "Consequently, if the evidence in the case demonstrates only that the defendant either possessed or lacked actual knowledge of the facts in question — and did not also demonstrate some deliberate efforts on his part to avoid obtaining actual knowledge — a willful blindness instruction should not be given." *Id.* (*citing United States v. Hiland*, 909 F.2d 1114, 1130-31 (8th Cir. 1990)).

The Ninth Circuit pronounces that a "deliberate ignorance" instruction "is appropriate only when the defendant purposely contrives to avoid learning all the facts, as when a drug courier avoids looking in a secret compartment he sees in the trunk of a car, because he knows full well that he is likely to find drugs there." *Mapelli*, 971 F.2d at 286. According to the Ninth Circuit, "[i]t is not enough that the defendant was mistaken, recklessly disregarded the truth or negligently failed to inquire." *Id.* (*citing United States v. Kelm*, 827 F.2d 1319, 1324 (9th Cir. 1987)). "The instruction is inappropriate where the facts point to actual knowledge rather than deliberate ignorance and should otherwise be used "sparingly." *Id.* (*citing United States v. Sanchez-Robles*, 927 F.2d 1070, 1073 (9th Cir. 1991)). "It is not a routine instruction for cases in which knowledge is at issue." *Id.*

The Tenth Circuit holds that a "deliberate ignorance" instruction must not be given "unless evidence, direct or circumstantial, shows that defendant's claimed ignorance of an operant fact was deliberate." *Francisco-Lopez*, 939 F.2d at 1410-11. "[A] deliberate ignorance instruction must not be tendered to the jury unless sufficient independent evidence of deliberate avoidance of knowledge has been admitted." *Id.* The Tenth Circuit emphasizes that

> the same fact or facts cannot be used to prove both actual knowledge and deliberate indifference because the two are mutually exclusive concepts. If evidence proves the defendant actually knew an operant fact, the same evidence could not also prove he was ignorant of that fact. Logic simply defies that result.

Id.

The Tenth Circuit explains that giving the instruction when there is evidence of direct knowledge, but no evidence of avoidance of knowledge, risks a conviction based upon a mere negligence standard. *Id.*

Similarly, the Eleventh Circuit has cautioned that a "deliberate ignorance" charge should not be given in every case in which a defendant claims a lack of knowledge, "but only in those comparatively rare cases where . . . there are facts that point in the direction of deliberate ignorance." *Rivera*, 944 F.2d at 1570-72; *see also United States v. Prather*, 205 F.3d 1265, 1270 (11th Cir. 2000). The Eleventh Circuit points out that "[t]he danger of overly liberal use of such an instruction in an inappropriate case is that juries will convict on a basis akin to a standard of negligence: that the defendant should have known that the conduct was illegal." *Id.* "Thus, the important safeguard of the law that a criminal defendant must be shown to have had knowledge of culpable behavior, subjectively viewed, may be watered down in those cases in which a deliberate ignorance instruction is incongruous with the facts of a crime." *Id.* "A further consideration suggesting that courts should be guarded in their use of deliberate ignorance instructions is simply that deliberate ignorance is easier to prove than actual knowledge and that prosecutors should not be granted such a windfall advantage when the giving of such an instruction is not appropriate." *Id.*

Based upon the tremendous disparity among the circuits as to when a "deliberate ignorance" instruction is appropriate and whether an improperly given instruction violates a defendant's due process rights, a criminal defendant's fate will largely be determined by which circuit he or she is prosecuted in. Since the government argued the same facts

to prove Petitioner Frye's actual knowledge and "deliberate ignorance" of the methamphetamine conspiracy, the jury would not have been instructed on "deliberate ignorance" had Petitioner Frye been tried in the Eighth, Ninth, Tenth or Eleventh Circuits. However, since Petitioner Frye was tried in the Sixth Circuit and because the Sixth Circuit does not view proof of actual knowledge and "deliberate ignorance" as mutually exclusive theories, the jury was instructed on "deliberate ignorance." As a result, Petitioner Frye's due process rights were violated.

Courts must studiously guard against the danger of shifting the burden to the defendant to prove his or her innocence. *See Murrieta-Bejarano*, 552 F.2d 1333 (9th Cir. 1977) ("The effect of a [deliberate ignorance] instruction in a case in which no facts point to deliberate ignorance may be to create a presumption of guilt."); *cf. Sandstrom v. Montana*, 442 U.S. 510, 521, 99 S. Ct. 2450, 2458, 61 L. Ed. 2d 39 (1979) (disapproving of jury instructions that contain presumptions which shift the burden of proof of an element of a crime to the defendant). By instructing the jury on "deliberate ignorance" when unwarranted by the underlying facts, the district court invaded the province of the jury, shifted the burden to Petitioner Frye to prove her innocence and reduced the government's burden of proof to a mere negligence standard thereby violating Petitioner Frye's due process rights.

B. The Circuits are Split Regarding the Manner in Which the Harmless Error Doctrine is Applied to an Improper Instruction on "Deliberate Ignorance."

The circuits are also split regarding the applicability of the harmless error doctrine to an improper "deliberate ignorance" instruction. Four circuits have adopted the rule that an unsupported "deliberate ignorance" instruction is harmless error per se. *See United States v. Stone*, 9 F.3d 943, 937-38 (11th Cir. 1993); *United States v. Ebert*, 178 F.3d 1287 (4th Cir. 1999); *United States v. Mari*, 47 F.3d 782, 785-87 (6th Cir. 1995); *United States v. Adeniji*, 31 F.3d 58, 63-64 (2d Cir. 1994). However, five circuits have expressed the view that the giving of an unsupported "deliberate ignorance" instruction can be reversible error even if there was sufficient evidence to support the conviction on an alternative basis. *See United States v. Caliendo*, 910 F.2d 429, 435 (7th Cir. 1990); *United States v. Covington*, 133 F.3d 639, 645 (8th Cir. 1998); *United States v. Aguilar*, 80 F.3d 329, 333 (9th Cir. 1996); *United States v. Hilliard*, 31 F.3d 1509, 1517 (10th Cir. 1994); *United States v. Ojebode*, 957 F.2d 1218, 1228-29 (5th Cir. 1992).

The circuits which find the error to be harmless per se all adopted the "fundamental . . . presumption that juries obey . . . 'the instructions given them by the trial judge.' " *Stone*, 3 F.3d at 938 (*quoting Marshall v. Lonberger*, 459 U.S. 422, 438 n.6, 103 S. Ct. 843, 74 L. Ed. 2d 646 (1983)). The *Stone* Court reasoned that this presumption necessarily rendered the error of giving the "deliberate ignorance" instruction harmless, because "[i]f . . . there was insufficient evidence of deliberate ignorance to prove that theory beyond a reasonable doubt, then the jury, following the instruction, as we must assume it did, did not convict on deliberate

ignorance grounds." *Id.* at 938. Thus, *Stone* reasoned, "[b]ecause we presume that the jury followed its instructions, it follows that the jury disregarded the deliberate ignorance instruction and that the guilty verdict was based on the only remaining theory: [the defendants'] actual knowledge." *Id.* at 940.

Other circuits find that a conviction is not automatically reversed when a willful blindness instruction is erroneously given; rather, the conviction stands if the error was harmless. *United States v. Regan*, 940 F.2d 1134, 1136 (8th Cir. 1991). The standard used to determine if an error is harmless depends on whether the error affects a constitutional right. *United States v. Drummond*, 903 F.2d 1171, 1174 (8th Cir. 1990). Those circuits find that "[t]he improper use of the willful blindness instruction does affect constitutional rights because it creates a risk that the defendant will be convicted because he acted negligently or recklessly, thereby relieving the government of its constitutional obligation to prove the defendant's knowledge beyond a reasonable doubt." *United States v. White*, 794 F.2d 367, 371 (8th Cir. 1986); *see also United States v. de Francisco-Lopez*, 939 F.2d 1405, 1411 (10th Cir. 1991); *Caliendo*, 910 F.2d at 435; *United States v. Beckett*, 724 F.2d 855, 856 (9th Cir. 1984); *Sandstrom v. Montana*, 442 U.S. 510, 521, 99 S. Ct. 2450, 2458, 61 L. Ed. 2d 39 (1979). These five circuits endeavor to determine whether, absent the error, it is "clear beyond a reasonable doubt that the jury would have returned a verdict of guilty[.]" *United States v. Hasting*, 461 U.S. 499, 510-11, 103 S. Ct. 1974, 1981, 76 L. Ed. 2d 96 (1983); *see also United States v. Johnson*, 968 F.2d 768, 772 (8th Cir. 1992); *Rose v. Clark*, 478 U.S. 570, 580-81, 106 S. Ct. 3101, 92 L. Ed. 2d 460 (1986) (*citing Chapman v. California*, 386 U.S. 18

(1967)).[2] Here, the erroneous presumption created by the

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2. *Compare United States v. Perez-Tosta*, 36 F.3d 1552, 1565 (11th Cir. 1994) (error in including deliberate ignorance instruction in absence of evidence showing deliberate ignorance harmless when jury could easily have found actual knowledge) *and United States v. Cicero*, 22 F.3d 1156, 1161-62 (D.C. Cir. 1994) (error in instruction about precision with which government would have to prove date of crime harmless when jury would have found same way) *with Yates v. Evatt*, 500 U.S. 391, 408-11 (1991) (reversal required when erroneous jury instructions may have contributed to guilty verdict); *United States v. MacDonald & Watson Waste Oil Co.*, 933 F.2d 35, 55 n.20 (1st Cir. 1991) (reversal required because jury instruction that proof that employee of hazardous waste disposal facility responsible corporate officer conclusively proved employee had knowledge of illegal acts erroneous and error not harmless beyond reasonable doubt); *United States v. Melendez*, 90 F.3d 18, 21-22 (2d Cir. 1996) (reversal of conviction for drug trafficking crime with thirty year enhancement for using or carrying machine gun required when jury instruction included too broad definition of "use" and impossible to determine whether verdict rested on legally sufficient theory); *Gilbert v. Moore*, 121 F.3d 144, 149 (4th Cir. 1997) (reversal required when jury instruction created rebuttable presumption of implied malice in capital murder trial); *United States v. Thomas*, 86 F.3d 647, 650-51 (7th Cir.) (reversal required when court erroneously instructed jury that "use" of firearm included providing person with security and confidence to commit crime because court not convinced properly instructed jury would have convicted), *cert. denied*, 117 S. Ct. 392 (1996); *United States v. Baumgardner*, 85 F.3d 1305, 1309-10 (8th Cir. 1996) (reversal required when erroneous jury instruction omitted materiality, thus removing essential element from jury's deliberation because not harmless beyond reasonable doubt); *United States v. Spring*, 80 F.3d 1450, 1466 (10th Cir.) (reversal required when jury instruction erroneously explained "carrying" element in prosecution for aiding and abetting in using or carrying firearm during commission of bank robbery), *cert. denied*, 117 S. Ct. 385 (1996); *United States v. Ruiz*,

(Cont'd)

factually unsupported "deliberate ignorance" instruction undoubtedly contributed to the jury's verdict. Nonetheless, since Petitioner Frye was prosecuted in the Sixth Circuit, rather that the Fifth, Seventh, Eighth, Ninth or Tenth Circuits, the error was considered harmless per se.

CONCLUSION

For reasons stated herein, Petitioner Frye respectfully requests that her petition for writ of certiorari be granted.

Respectfully submitted,

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(Cont'd)

59 F.3d 1151, 1155 (11th Cir.) (reversal required when court erroneously denied instruction on mistake-of-fact defense when defense not covered by existing instruction and denial seriously impaired defense because not harmless beyond reasonable doubt), *cert. denied*, 116 S. Ct. 956 (1996) and *United States v. Rawlings*, 73 F.3d 1145, 1149 (D.C. Cir. 1996) (reversal required when instructions erroneously created hierarchy among offense elements because diverted jurors' focus from finding essential elements beyond reasonable doubt).

APPENDIX

APPENDIX A — PER CURIAM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED AND FILED JANUARY 5, 2000

NO. 98-5174

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff – Appellee

v.

PEGGY FRYE,

Defendant – Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE

OPINION

BEFORE: KRUPANSKY, RYAN, Circuit Judges, and HULL,* District Judge.

Per Curiam. In November 1996, the Grand Jury in the Middle District of Tennessee indicted seven people, including Peggy Frye, on seventeen counts of conspiracy, drugs, firearms, and forfeiture which arose out of the

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* The Honorable Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.

defendant's involvement in a methamphetamine distribution ring with her husband, Earl Frye. The government estimates that the Fryes imported into Tennessee at least 120 kilograms of methamphetamine over a four-year period.

Over the next ten months the government filed two superseding indictments, one of which removed Earl Frye due to his death. In the second superseding indictment which had twenty counts, five counts implicated Peggy Frye — count one, for conspiracy to distribute one or more kilograms of methamphetamine, in violation of 21 U.S.C. § 841(a)(1) and (b)(1)(A); count eleven, with illegal interstate travel, in violation of 18 U.S.C. § 1952; count fourteen, attempt to possess with intent to distribute methamphetamine, in violation of 21 U.S.C. § 841(a)(1); counts seventeen and twenty with illegal use of a telephone facility, in violation of 21 U.S.C. § 843(b); and count sixteen, a forfeiture provision relating to count one, under 21 U.S.C. § 853.

Frye pled not guilty and was tried by a jury along with co-defendants Timothy Holloway, Steve Nicely, John "Jack" William Parks, Robert Carney, Morris Parks, and Ronnie Dixon. A month-long trial resulted in Frye's acquittal in regard to Count 14, her conviction on Counts 1, 11, 17 and 20, and a partial verdict on Count 16 for a criminal forfeiture. The district court sentenced the defendant to a total of 151 months in prison. A preliminary order of forfeiture was entered regarding Frye's property as described in Count 16 of the indictment.

Frye seeks review of eight issues. Three of the issues raised by Frye have been addressed and resolved adversely

to her by this Court in co-defendant Holloway's expedited appeal. *United States v. Holloway*, 166 F.3d 1215, 1998 WL 833767, 2 (6th Cir. (Tenn.)). These issues are: (1) that the district court erred in denying Frye's motion to suppress evidence obtained through electronic surveillance, (IV) that the district court erred in failing to grant a motion for mistrial based upon the "highly inflammatory" testimony of government witness Larry Campbell, and (VI) that the district court should have followed the Tenth Circuit's vacated decision in *United States v. Singleton*, 144 F.3d 1343 (10th Cir.1998), vacated and *reh'g en banc* granted, 144 F.3d 1343 (10th Cir.1998), and found that the prosecution improperly offered leniency to cooperating accomplices. This Court's rulings on these issues in the Holloway appeal are now the law of the case. Therefore, we will focus on Frye's remaining five contentions.

I

Frye contends that the court erred in admitting evidence of prior bad acts on the part of co-defendant Holloway which consisted of threats made by Holloway while he was awaiting trial. The court properly instructed the jury that this evidence could only be used against Holloway.

In *United States v. Scaife*, 749 F.2d 338 (6th Cir.1984), this court found no abuse of discretion even though evidence of one defendant's attempted murder of an FBI agent was admitted during a joint trial for robbery and even though the other defendants were not charged with the attempt. This court has recognized that there is always a danger a jury will convict on the basis of cumulative evidence, rather than evidence relating to each defendant, but "[t]he jury must be

presumed capable of sorting out the evidence and considering the case of each defendant separately." *United States v. Causey*, 834 F.2d 1277, 1288 (6th Cir. 1987) *cert. denied*, 486 U.S. 1034 (1988) (quoting *United States v. Warner*, 690 F.2d 545, 553 (6th Cir.1982)).

In *United States v. Gallo*, 763 F.2d 1504, 1525 (6th Cir.1985), *cert. denied*, 475 U.S. 1017 (1986), we stated, "[m]erely because inflammatory evidence is admitted against one defendant, not directly involving another codefendant (and with which the other is not charged) does not, in and of itself, prove substantial prejudice in the latter's trial." As in *Gallo*, the jury in this case was able to acquit Frye on one count while convicting her on others, which strongly suggests that the jury was not confused by the testimony adduced at trial and was able to attribute evidence to each defendant on an individual basis. *Id.* at 1525-1526. Therefore, this Court finds no abuse of discretion in the admission of this evidence, and no substantial prejudice in regard to the trial of Frye.

II

Following jury selection, Frye moved to strike the jury venire, and now contends that the district court erred in failing to do so based upon a comment made by the court to the jury during voir dire. Specifically, this colloquy was as follows:

> Mr. Strianse: How do you feel about the Government secretly and clandestinely recording conversations, private and personal conversations?

> And do you see the distinction that I make between these consensual recordings which are done without judicial authorization every day of the week and this other investigative technique that I'm talking about, a very intrusive investigative technique?
>
> This is your time to tell us. Does anybody have a problem with that at all? No problem with your government secretly and clandestinely recording people's conversations?
>
> MS. GOGGIN: Your Honor —
>
> THE COURT: Sustained. Ladies and Gentlemen of the Jury, that was authorized by me. And it cannot be done unless it's authorized by a judge.

The district judge's comment to the jury, at most, clarified a point of law on the issue of the wire-tap. It was not, as suggested, a comment on the evidence and in no way communicated to the jury the trial judge's impression of the credibility of the recorded conversations. Moreover, since the statement was a correct recitation of the law, the only prejudice that could possibly have resulted to the defendant is that she would have been denied the benefit of a jury inference drawn from an incorrect understanding of the law. Clearly, a criminal defendant is not entitled to such inferences and it is the function of the presiding judge in jury trials to properly instruct the jury on the law to assure that impermissible inferences are not drawn. *United States v. Mosely*, 810 F.2d 93, 98 (6th Cir.1987), *cert. denied*, 484

U.S. 841 (1987). Furthermore, any possible improper inference that the jury might have drawn from this comment was adequately addressed in the court's instructions:

> You must make your decision based only on the evidence that you saw and heard here in court. Do not let rumors, suspicions or anything else that you may have seen or heard outside of court influence your decision in any way.
>
> The evidence in this case includes only what the witnesses said while they were testifying under oath, the exhibits that I allowed into evidence, the stipulations that the lawyers agreed to, and the facts that I have judicially noticed. Nothing else is evidence. The lawyers' statements and arguments are not evidence. Their questions and objections are not evidence. My legal rulings are not evidence. And my comments and questions are not evidence.
>
> During the trial, I did not let you hear the answers to some of the questions that the lawyers asked. I also ruled that you could not see some of the exhibits that the lawyers wanted you to see. And sometimes I ordered you to disregard things that you saw or heard, or I struck things from the record.
>
> You must completely ignore all of these things. Do not even think about them. Do not speculate about what a witness might have said

> or what an exhibit might have shown. These things are not evidence. And you are bound by your oath not to let them influence your decision in any way.
>
> Make your decision based only on the evidence as I have defined it here and nothing else.

In concluding the charge, the district court also stated:

> Let me finish up by repeating something that I said to you earlier. Nothing that I have said or done during this trial was meant to influence your decision in any way. You decide for yourselves if the Government has proved a defendant guilty beyond a reasonable doubt.

Due to the innocuous nature of the comment made to the jury, and based upon the curative instruction given by the court, it cannot be said that Frye was harmed to such an extent that reversal of the conviction is warranted. *Id.* at 99 (citing *United States v. Olgin*, 745 F.2d 263, 268-70 (3d Cir.1984), *cert. denied*, 471 U.S. 1099.

III

Frye further contends that the court erred by giving a deliberate ignorance instruction because it was not supported by evidence at trial. According to the defendant, this instruction is only warranted when a defendant is subjectively aware of a high probability of the existence of the illegal

conduct, and the defendant purposely contrived to avoid learning of the illegal conduct. At trial, there was evidence that although Frye suspected her husband of dealing in stolen automotive parts, she did not suspect him of dealing in drugs.

In reviewing the use of a deliberate ignorance charge in *United States v. Monus*, 128 F.3d 376, 390-391 (6th Cir.1997), *cert. denied*, 119 S. Ct. 67 (1998), we stated:

> This issue is controlled by *United States v. Mari*, 47 F.3d 782 (6th Cir. 1995), in which a defendant appealed his conviction on the grounds that there was insufficient evidence at trial to support a deliberate ignorance instruction that was virtually identical to the instruction given in this case. In *Mari*, we held that a deliberate ignorance instruction that might have been unsupported by sufficient evidence but did not misstate the law was at worst harmless error. *Id.* at 785-86. We recognized that we must assume that the jury obeyed the language of the district court's instructions. *Id.* at 785. The words of the instruction required the jury to find beyond a reasonable doubt that the defendant was deliberately ignorant before it could convict on that ground. Therefore, even if there had been insufficient evidence to support a deliberate ignorance instruction, we must assume that the jury followed the jury charge and did not convict on the grounds of deliberate ignorance. Thus, another theory must have formed the basis for the conviction. *Id.* at 785-87. The *Mari* analysis

> governs this case, and we hold that the deliberate ignorance instruction was at worst harmless error.

In this case, we find that the district court's instruction did not misstate the law because the district court used verbatim the pattern instruction which has been approved by this court. Therefore, even if there was insufficient evidence to support the use of the charge, the deliberate ignorance instruction was at worst harmless error. However, we find that there was sufficient evidence to support the use of the charge and that no error occurred.

IV

Frye contends that Federal Rule of Criminal Procedure (FRCP) 7(c)(2), which requires that "no judgment of forfeiture may be entered in a criminal proceeding unless the indictment or the information shall allege the extent of the interest or property subject to forfeiture," was violated because the jury did not answer special interrogatory no. 2, *i.e.*, whether all of Frye's rights were subject to forfeiture. However, the jury did find that this property was derived from or used for drug trafficking, and forfeitable.

The plain language of Rule 7(c)(2) requires only that the extent of the interest or property subject to forfeiture be alleged. That condition was satisfied in the instant case because the second superceding indictment announced that the government would seek any interest which Frye had in the real property at 760 Wixtown Road in Westmoreland, Tennessee. The property was identified in Count 16 of the indictment as:

> 2. Real property known as 760 Wixtown Road, Westmoreland (Macon County), Tennessee, together with its buildings, improvements, fixtures, attachments, and easements thereon, further described as Parcel No. 052-001.01 in the 11th Civil District of Macon County, State of Tennessee, conveyed to Earl Frye and wife, PEGGY FRYE by Delmer Frye and wife, Dean Frye, by Warranty Deed dated February 19, 1982, and recorded on February 19, 1982, in Deed Book 120 at page 77 of the Office of the Recorder of Deeds of Macon County, Tennessee.

We find that the language of the indictment clearly identified the property and was sufficient to put Frye on notice that the entire property was subject to forfeiture. *U.S. v. Duval*, 902 F.2d 35, 1990 WL 52371, 6-7 (6th Cir. (Mich.)) (citing *United States v. Boffa*, 688 F.2d 919, 939 (3d Cir.1982) (by alleging that all of appellants' interest in enumerated property was subject to forfeiture, the indictment alleged the "extent of the interest or property subject to forfeiture"), *cert. denied*, 460 U.S. 1022 (1983), *United States v. Grammatikos*, 633 F.2d 1013, 1024 (2d Cir.1980) (principal objective of Rule 7(c)(2) is met if person facing charges is given notice that forfeiture will be sought)).

In the present case, Frye was not prejudiced by the jury's failure to identify her interest in the property deemed susceptible to forfeiture, because the property was fully identified in the indictment. Therefore, no reversible error occurred.

V.

Frye also asserts that the district court erred in failing to make a finding as to whether "l-" or "d-" methamphetamine

was involved in the conspiracy. We find defendant's argument unpersuasive. When an offense begins before but continues after the effective date of a Guideline or amendments thereto, the most recent Guideline applies. See *United States v. Barger*, 931 F.2d 359, 365 (6th Cir.1991) (conspiracy). We conclude that the drug conspiracy at issue here constitutes a continuing offense.

Prior to November 1, 1995, the Sentencing Guidelines distinguished between the two types of methamphetamine and mandated harsher sentences for offenses involving d-methamphetamine. See, U.S.S.G. § 2D1.1, comment. (n.10) (Nov. 1994). The distinction between "l-" and "d-" methamphetamine was eliminated by Amendment 518, which became effective on November 1, 1995. Comprehensive Drug Abuse Prevention and Control Act of 1970, § 406, 21 U.S.C.A. § 846; U.S.S.G. App. C, 18 U.S.C.A.

The conspiracy of which Frye was convicted occurred between "the later part of 1992 through and continuing through in or about January 1996." Therefore, the Sentencing Guidelines applicable to Frye are those in effect in January of 1996, and the district court's alleged failure to make a finding as to the type of methamphetamine involved in the conspiracy is not error because such a finding was unnecessary under the November 1995 guidelines. *United States v. Maggard*, 156 F.3d 843, 849 (8th Cir.1998), *cert. denied*, __ U.S. __, 119 S. Ct. 1094, 143 L.Ed.2d 93 (1999).

CONCLUSION

We have considered Frye's eight claims and we AFFIRM her conviction and sentencing.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, COOKEVILLE DIVISION RE JURY INSTRUCTIONS

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF TENNESSEE
COOKEVILLE DIVISION

2:96-00013

UNITED STATES OF AMERICA

v.

PEGGY FRYE, et al.

ORDER

Defendants Peggy Frye, Steve Nicely, Robert Carney, and Timothy Holloway have submitted a number of requested special jury instructions. The government has also submitted a proposed instruction. The following requested instructions are hereby GRANTED: government's proposed jury instruction on deliberate ignorance; Peggy Frye's requested instruction No. 2; Peggy Frye's requested instruction No. 15; Timothy Holloway's requested instruction, Steve Nicely's instruction No. 3; and Steve Nicely's instruction No. 6. The following requested instructions were previously incorporated into the jury charge and are therefore DENIED: Peggy Frye's requested instruction No. 1, and Nos. 3-14; Robert Carney's first and second proposed instructions; and Steve Nicely's requested instructions Nos. 1, 2, 4, 5, and 7.

Appendix B

It is so ordered.

s/ Thomas A. Wiseman, Jr.
Thomas A. Wiseman, Jr.
Senior United States District Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND FILED FEBRUARY 18, 2000

98-5174

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

PEGGY FRYE,

Defendant-Appellant.

ORDER

BEFORE: KRUPANSKY and RYAN, Circuit Judges; and HULL,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

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* Hon. Thomas G. Hull, United States District Judge for the Eastern District of Tennessee, sitting by designation.

Appendix C

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT

s/ Leonard Green
Leonard Green, Clerk